(41)

Supreme Court, U.S.
FILED
MAR 10 2003
OFFICE OF THE CLERK

No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

REPLY BRIEF

PAUL M. SMITH
WILLIAM M. HOHENGARTEN
DANIEL MACH
DAVID C. BELT
SHARON M. MCGOWAN
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, DC 20005
(202) 639-6000

RUTH E. HARLOW
Counsel of Record
PATRICIA M. LOGUE
SUSAN L. SOMMER
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall Street, Suite 1500
New York, NY 10005
(212) 809-8585

MITCHELL KATINE
WILLIAMS, BIRNBERG &
ANDERSEN, L.L.P.
6671 Southwest Freeway,
Suite 303
Houston, TX 77074
(713) 981-9595

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

27 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. Respondent's Objection to Consideration of the Questions Presented Is Waived and, in Any Event, Meritless 1

II. The Homosexual Conduct Law Unconstitutionally Burdens a Fundamental Right 3

III. The Homosexual Conduct Law Draws an Explicit Classification That Denies Equal Protection of the Laws 11

CONCLUSION 20

TABLE OF AUTHORITIES

CASES — Page

Apprendi v. New Jersey, 530 U.S. 466 (2000) 1

Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985) 14

Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002) 3

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 5

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 18

Bowers v. Hardwick, 478 U.S. 186 (1986) 7, 9

Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996) 9

Carey v. Population Services International, 431 U.S. 678 (1977) 6, 7

City of Canton v. Harris, 489 U.S. 378 (1989) 1

City of Chicago v. Morales, 527 U.S. 41 (1999) 2

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 16

Commonwealth v. Balthazar, 318 N.E.2d 478 (Mass. 1974) 9

Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) 9

Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) 13, 16

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 4

TABLE OF AUTHORITIES - continued

Page

Eisenstadt v. Baird, 405 U.S. 438 (1972) 2, 6, 7

Gay & Lesbian Advocates & Defenders v. Attorney General, 763 N.E.2d 38 (Mass. 2002) 9

Griswold v. Connecticut, 381 U.S. 479 (1965) 5

Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002) 13, 16

McLaughlin v. Florida, 379 U.S. 184 (1960) 12

Mercer v. State, 17 Tex. App. 452 (1885) 8

Michael H. v. Gerald D., 491 U.S. 110 (1989) 4

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 16

Morgan v. State, 688 S.W.2d 504 (Tex. Crim. App. 1985) 2

Pace v. Alabama, 106 U.S. 583 (1883) 12

People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) 9

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 12

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) ..... *passim*

Plessy v. Ferguson, 163 U.S. 537 (1896) 20

Poe v. Ullman, 367 U.S. 497 (1961) 5

Rex v. Wiseman, 92 Eng. Rep. 774 (K.B. 1716) 8

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 5

Romer v. Evans, 517 U.S. 620 (1996) ..... *passim*

TABLE OF AUTHORITIES - continued

Page

State v. Morales, 826 S.W.2d 201 (Tex. App. 1992), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994) 13

State v. Saunders, 381 A.2d 333 (N.J. 1977) 9

United States v. Salerno, 481 U.S. 739 (1987) 2

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 12, 16, 20

United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) 14

Washington v. Glucksberg, 521 U.S. 702 (1997) 4

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 11

In re Winship, 397 U.S. 358 (1970) 1

STATUTES AND RULES

Sup. Ct. R. 15.2 1

Ga. Code Ann. § 4286 (1867) 8

Tex. Code Crim. Proc. Ann. art. 44.02 2

Tex. Pen. Code § 21.06 ..... *passim*

MISCELLANEOUS

The Federalist No. 10 (Madison) (Isaac Kramnick ed. 1987) 11

Model Penal Code and Commentaries (1980) 8, 9

TABLE OF AUTHORITIES - continued

Page

Seth Mnookin, *Is Rolling Stone's HIV Story Wildly Exaggerated?*, Newsweek Web Exclusive, Jan. 23, 2003 18

Seth Mnookin, *Using 'Bug Chasers,'* Newsweek, Feb. 17, 2003 18

Randy Von Beitel, *The Criminalization of Private Homosexual Acts*, 6 Human Rights 23 (1977) 14

The Court should reject Respondent's meritless and untimely arguments for avoiding a decision on the important questions presented and should enforce the core rights of liberty and equal protection that are at stake in this case. Texas has no proper role supplanting the individual decisions of adults with the legislature's or electorate's different judgments concerning the private, intimate relations proscribed by the Homosexual Conduct Law, nor any legitimate basis for singling out same-sex couples for a criminal ban. Through this law, Texas flouts the essential American values of privacy and equal justice for all. Those values, jointly embodied in the Fourteenth Amendment, are critical limits on the power of the State that require vindication here.

I. Respondent's Objection to Consideration of the Questions Presented Is Waived and, in Any Event, Meritless.

Texas begins with a belated plea for the Court to dismiss this case. The State now objects to consideration of the questions presented on the ground that the record does not reveal more, beyond the scope of the crime charged, about Petitioners' sexual relations or orientations. That objection is waived because it was not raised in the State's opposition to the petition for certiorari. *See* Sup. Ct. R. 15.2; *City of Canton v. Harris*, 489 U.S. 378, 383-85 (1989). Moreover, it has no merit.

Speculation that Petitioners might have committed some other offense that was neither charged nor proved cannot save the constitutionality of this law or Petitioners' convictions under it. This is a criminal prosecution; therefore, the State must allege and prove the elements necessary for conviction. *In re Winship*, 397 U.S. 358, 364 (1970); *see Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Petitioners were charged with and convicted of the crime of "Homosexual Conduct" simply for "engag[ing] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." Pet. App. 127a, 129a; *see also id.* 114a-15a (State's evidence offered on Petitioners' pleas of *nolo contendere*). The record also shows that Petitioners are unmarried adults and that the police intruded on and arrested them in Lawrence's home. *Id.* at 129a, 141a. If the State had wanted to premise its actions here on something more, *the State* would have had to allege and

prove one or more additional elements. Texas cannot avoid a challenge to this law and Petitioners' convictions by speculating that their conduct might have involved additional facts. *E.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 464-65 (1972) (White, J., concurring in result).[1] This case cleanly presents the question whether "consensual, adult, private sexual relations," without more, may be punished by the State. Pet. App. 118a, 131a.

Equally meritless is the State's suggestion that Petitioners may not challenge the statute's discriminatory classification because they did not separately prove they are "exclusively homosexual." Resp. Br. 7, 33-34.[2] The State determined that Petitioners fell within the statutory classification and convicted them for conduct that would have been perfectly legal for different-sex intimate partners. They are the direct victims of the discrimination they challenge, discrimination that is explicit in the terms of the statute. It is hard to imagine circumstances that would more strongly support standing and the need to resolve whether Texas employs a permissible classification.

A few *amici* – but not Texas – also contend that Petitioners can assert only a facial challenge and that *United States v. Salerno*, 481 U.S. 739 (1987), governs that challenge. They are incorrect. Section 21.06 was applied to Petitioners in these criminal prosecutions, and they challenge it both as applied and facially. Pet. App. 117a, 130a.[3] Even with respect to the facial challenge,

---

[1] Similarly, if a person were convicted under a law that made it a crime simply to walk down the street, the State could not insulate the conviction or law from review by speculating that while walking down the street the defendant might have possessed illegal drugs. *Cf. City of Chicago v. Morales*, 527 U.S. 41 (1999).

[2] Texas casts this argument in terms of "standing," Resp. Br. 33-34, yet it concedes that "petitioners possess standing to challenge the constitutionality of a statute under which they have actually been prosecuted and convicted," *id.* at 7. The jurisdictional "case or controversy" requirement is plainly satisfied here. *See, e.g., Eisenstadt*, 405 U.S. at 443-44.

[3] Petitioners' pleas of *nolo contendere* preserved their facial and as-applied challenges. *See* Tex. Code Crim. Proc. Ann. art. § 44.02; *Morgan v. State*, 688 S.W.2d 504, 507 (Tex. Crim. App. 1985). The court of appeals described Petitioners' challenge in passing as facial, but that was apparently a reference to the absence of any Fourth Amendment attack on the police entry into Lawrence's home, *see* Pet. App. 5a, and the state court proceeded to consider Petitioners' challenge in light of the law's application to Petitioners for conduct "engaged in by consenting adults in private," *id.* at 24a; *see also id.* at 26a.

Salerno does not apply here.[4] Most importantly, *Salerno* is easily satisfied, because mere proof of a Homosexual Conduct offense is *always* constitutionally defective and discriminatory. The State's potential ability to criminalize sexual conduct under a *different* law that does not use an impermissible classification and that requires proof of additional elements cannot save the facial invalidity of *this* law.

II. The Homosexual Conduct Law Unconstitutionally Burdens a Fundamental Right.

The State's defense of the Homosexual Conduct Law against Petitioners' fundamental rights challenge is based almost entirely on history well past, to the exclusion of all other considerations. That single-minded focus is not true to this Court's fundamental rights jurisprudence. It ignores the critical personal interests at stake. And it distorts both the history Texas relies on and the last half-century's decisive rejection of state intrusion in this area.

1. The State's contention that fundamental rights are always circumscribed by legislation in effect in the past cannot be squared with this Court's precedents. How far government may go in reducing its citizens to mere creatures of the State, whose most private lives are policed according to majority sentiment, must be answered through "reasoned judgment" and is "not susceptible of expression as a simple rule." *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 849 (1992).

In *Casey*, the Court carefully reviewed its precedents and

---

[4] *See, e.g., Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 894-95 (1992) (facially invalidating law inhibiting fundamental liberty in "large fraction" of cases); *Berkley v. United States*, 287 F.3d 1076, 1090 n.14 (Fed. Cir. 2002) ("in equal protection cases involving facial challenges, the Supreme Court has . . . not discussed or applied the *Salerno* test").

definitively rejected the position "that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified," because that contraction of fundamental rights "would be inconsistent with our law." *Id.* at 847; *see also id.* at 848 (citing precedents expanding liberty beyond 19th-century confines). And *Casey* itself struck down a spousal notification law that was "consonant with the common-law status of married women" – and thus with historical legal tradition – but "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution." *Id.* at 898.

Texas relies primarily on the plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), and on *Washington v. Glucksberg*, 521 U.S. 702 (1997). Yet those cases do not break from the Court's long-standing recognition that traditions and liberties evolve, *see Casey*, 505 U.S. at 850, and do not support a rigid, strictly historical view of fundamental rights. In *Michael H.*, a majority of the Justices expressly *rejected* the plurality's statements on this very point. 491 U.S. at 132 (O'Connor, J., joined by Kennedy, J., concurring in part); *id.* at 137-41 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., dissenting). And *Glucksberg* was a case in which tradition, contemporary legislation, and powerful state interests all coincided to defeat the claim that a fundamental right was at stake. *See* 521 U.S. at 716-19, 728-35. Thus, in *Glucksberg* the Court had no occasion to decide that history alone is decisive, much less to overrule its precedents holding just the opposite. *See also County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring). While the Court examines relevant history in all cases, the personal liberty that is protected by the Due Process Clause is not perpetually frozen in the mold set by the laws of 1868 or any other bygone age. Nor is the Court's job merely to mirror all changes around it. The Court must apply its "reasoned judgment" to determine the deeper question of what is required to protect Americans' ordered liberty today.

2. The State here steps over the line and beyond its proper

powers to invade an essential American liberty. The fundamental rights question in this case turns on who has the power to make basic decisions about the specifics of sexual intimacy between two consenting adults behind closed doors. Is the decision about expressions of intimacy and choice of partner for two adults to make through mutual consent, or for the State to control through a criminal law enacted by the legislature?

In this most personal realm of human existence, the Constitution limits government's power to substitute the preferences of the majority for the individual choices of adults. Three previously recognized aspects of liberty point to that conclusion: the liberty interests in intimate relationships, bodily integrity, and the privacy of the home. Texas tries to isolate these liberties as discrete and unrelated legal technicalities, but in truth they are aspects of a single continuum that comprises the fundamental rights of a free people. *See Casey*, 505 U.S. at 848-49.

The virtually unlimited power to regulate sexual intimacy claimed by Texas directly interferes with constitutionally protected intimate associations. The relationship of an adult couple – whether heterosexual or gay – united by sexual intimacy is the very paradigm of an intimate association in which one finds "emotional enrichment" and "independently . . . define[s] one's identity," and it is protected as such from "unwarranted state interference." *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984) (family and other highly personal relationships protected under rubric of intimate association); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987) (same). The State impairs the protected relationship of two adults whose shared life includes sexual intimacy by regulating – or even outright forbidding – the sexual dimension of their relationship. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

In addition, Texas's view of the constitutional status of the home ignores the foundational connection between protection of the home and protection of the private intimacies that are nurtured there. *See, e.g., Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting). Likewise, the State's dismissive response

to Petitioners' fundamental interests in bodily integrity fails to come to grips with the reality that this case concerns the *government's* attempt to *dictate* whom one must take as a sexual partner – a person of the other sex – and the specific state-approved acts that may be performed. That implicates bodily integrity because the State is using the criminal law to impose the majority's own sexual preferences on every individual. Indeed, the State's *amici* would justify the law precisely because it attempts to compel (or "channel" people into) heterosexual relationships. By outlawing most types of sexual intimacy with any partner of the same sex, the State drastically interferes with a core aspect of personal liberty.

3. Gay Americans have the same liberty interests as heterosexuals here. Pet. Br. 16-19; Am. Psych. Ass'n. Br. 15-23. Texas does not appear to argue otherwise. Instead, although the law at issue does not do so, the State "urges the Court to draw the line at the threshold of the marital bedroom," Resp. Br. 24, thereby permitting government regulation or prohibition of *all* sexual intimacy outside marriage, whether with another adult of the same or different sex. But adult Americans who remain unmarried are not mere wards of the State who have ceded total dominion over the most intimate details of their lives to a majority of their neighbors or legislators. Texas's attempt to limit the fundamental interest at stake in this case to marital unions must be rejected.

Nor is restriction of this fundamental liberty to married persons supported by the Court's decisions. It is true that the Court's earliest privacy decisions, *Griswold* and Justice Harlan's dissent in *Poe*, suggested special solicitude for sexual relations in marriage. Since then, however, the Court has made clear that such rights belong to *individuals*, whether married or unmarried. *Eisenstadt*, 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *Carey v. Population Servs. Int'l*, 431 U.S. 678,

687 (1977) (same); *Casey*, 505 U.S. at 898 ("The Constitution protects all individuals . . . , married or unmarried, from the abuse of governmental power . . . ").

Of course, the Court's contraception and abortion cases did not directly present the question whether unmarried adults have fundamental liberties regarding *sexual* intimacy, and the Court expressly reserved that question in *Carey*, 431 U.S. at 688 n.5.[5] The logic of those decisions, however, mandates recognition that unmarried as well as married adults have a fundamental liberty interest in their private sexual relations. If the right to decide whether to bear or beget a child is for the *individual*, married or unmarried, the concomitant right to decide whether and with whom to engage in sexual intimacy cannot be for married couples only. Indeed, an unmarried individual could not meaningfully exercise the right to decide to bear or beget a child if the State may ban the sexual relations that lead to procreation. By the same token, the State may not ban sexual relations by unmarried persons that do *not* lead to procreation. The core teaching of the contraception cases is that the State may not force individuals to have only procreative sex. Thus, Texas's far-reaching argument that it may police the sexual choices of all unmarried adults – and may criminalize all same-sex intimacy as one aspect of that unconstrained power – cannot be accepted. Rejecting Texas's argument, and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), will bring coherence to the Constitution's protection of this deeply personal sphere for *all* adult Americans.

4. The history of regulation in this area also supports recognition of the fundamental liberty interests Petitioners assert. Indeed, Americans recognized long ago that government does not belong in the bedrooms of its citizens to mandate or forbid particular expressions of consensual intimacy. Since the Founding, such private policing has not been the norm. There is not a single reported 19th-century case clearly upholding a sodomy conviction

---

[5] Likewise, *Eisenstadt* held that the law there was not reasonably related to preventing sex outside marriage, without deciding whether the State could actually prohibit that conduct. 405 U.S. at 447 n.7, 448, 451 n.8.

for *private* consensual conduct between two adults. *See* Cato Br. 11-12 & App. 2; ACLU Br. 13-15; History Profs. Br. 7-9. Though the facts are not reported in all cases, in many they are, and every one of those involves force, minors, animals, or public places. Cato Br. App. 2.[6]

While the States historically had laws that technically applied to private consensual conduct, the vast majority of the laws proscribed specific conduct whether committed with a person of the same or different sex. Pet. Br. 5 & n.2, 21-22; Cato Br. 9-10 & n.13; History Profs. Br. 7, 10; ACLU Br. 12. Indeed, the laws often applied to married couples. *See Model Penal Code and Commentaries* § 213.2, cmt. 1, at 360 (1980). Thus, older laws did not single out "homosexual sodomy," and they applied to conduct that Texas concedes is constitutionally protected today.[7]

Most significantly, over the last half-century the States have rejected altogether laws that criminalize certain forms of private sexual intimacy between two consenting adults. Texas attempts to trivialize this decisive historic turn as a mere "experiment" by a handful of States acting as laboratories. In reality, it reflects a profound judgment about the limits of government control over the intimate and private details of the lives of Americans.

---

[6] Texas's *amicus* Center for Original Intent of the Constitution (COIC) distorts the historical record. For example, COIC quotes dicta from *Mercer v. State*, 17 Tex. App. 452 (1885), to argue that sodomy laws were enforced against consensual private adult conduct. COIC Br. 17. In fact, *Mercer* was a prosecution for incest in which the defendant repeatedly raped his daughter from the time she was 13. 17 Tex. App. at 453-54, 456-57. None of the cases cited by COIC expressly upheld a conviction for private consensual sodomy between two adults.

[7] COIC tries to invent a tradition of discrimination by exaggerating the very small number of States with same-sex-only laws in the past. COIC Br. 10-14. For example, COIC counts Georgia as having a same-sex-only law in 1868, *id.* at 12 & n.19; in reality, the Georgia statute barred "carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Code Ann. § 4286 (1867). Most of the other laws cited by COIC as same-sex-only referred to lying with "mankind," but those laws reached heterosexual conduct. *See* Cato Br. 10 n.13; *Rex v. Wiseman*, 92 Eng. Rep. 774 (K.B. 1716).

Beginning in 1961, the legislatures of more than half the States repealed their sodomy laws in agreement with the influential policy of decriminalization expounded in the *Model Penal Code*. *See* Pet. Br. 23; *Bowers*, 478 U.S. at 194 n.7. "[T]he decisive factor favoring decriminalization . . . [was] 'the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality.'" *Model Penal Code and Commentaries* § 213.2, cmt. 2 (quoting Report of Committee on Homosexual Offenses and Prostitution, Great Britain, at 52 (Am. ed. 1963)); *see also* ABA Br. App. 10a-11a (1973 ABA report urging repeal because "such laws impinge on the constitutionally protected zone of privacy that surrounds each individual and serve no valid state purpose").

In addition, beginning in 1974, the courts of another eleven States struck down their sodomy laws (or narrowly construed them not to apply to private consensual conduct) in light of the laws' invasion of a realm that belongs to individuals, not the State.[8] These judicial invalidations likewise reflect a fundamental judgment that our system of ordered liberty bars government intrusion into this quintessentially private sphere based on the mere moral preferences of the majority. Pet. Br. 24. As the Tennessee court explained, "[i]nfringement of such individual rights cannot be tolerated until we tire of democracy and are ready for communism or a despotism." *Campbell v. Sundquist*, 926 S.W.2d 250, 261 n.9 (Tenn. Ct. App. 1996).[9] Today, consensual sodomy offenses remain on the books in only 13 States. Tellingly, only

---

[8] *See* Pet. Br. 23 n.17 (listing cases); *Commonwealth v. Balthazar*, 318 N.E.2d 478, 481 (Mass. 1974), *reaffirmed by Gay & Lesbian Advocates & Defenders v. Attorney General*, 763 N.E.2d 38, 40 (Mass. 2002); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980).

[9] The same deep-seated understanding undergirds the general repeal or invalidation of laws criminalizing fornication. Pet. Br. 23 & n.18; *see, e.g.*, *Model Penal Code and Commentaries*, art. 213, note 3, at 437 ("assigning criminal punishment to instances of private immorality can justly be regarded as an invasion of personal liberty"); *State v. Saunders*, 381 A.2d 333, 343 (N.J. 1977) ("the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy").

four of those States appear here in defense of these laws.

Thus, our Nation's history of shielding the particulars of sexual intimacy between two adults from undue government interference is not limited to the decisions of "a few state appellate courts . . . in the 1990s," Resp. Br. 20. Rejection of intrusions on private sexual intimacy is centuries-old, and rejection of the invasive laws themselves is decades-old, extending to the vast majority of jurisdictions in this country. The significance of this tradition is reinforced by the fact that the movement has been all in one direction. In the 42 years since 1961, no State has turned backward from abolition, and none has initiated a campaign of enforcing sodomy laws against private consensual conduct. Our Nation's tradition of protecting fundamental rights is a "living thing," *Casey*, 505 U.S. at 850 (quotation marks omitted), and safeguarding this most private aspect of two adults' lives from unjustified state encroachment is an extremely vital part of that tradition today.

5. Texas and its *amici* expend considerable effort litigating cases that are not before the Court. They conjure up a parade of horribles – invalidation of laws against bestiality, prostitution, incest, adultery, bigamy – that will allegedly follow a ruling for Petitioners. Those are chimeras. Comparison of the intimate relations of two human beings – married or unmarried, same-sex or different-sex – with bestiality is simply offensive. Nor do the other kinds of laws in the parade involve such a wholesale and devastating burden on individual liberty as here – where *all* same-sex partners are prohibited, for a vast range of intimate acts. Moreover, in the other areas conjured up to distract the Court, the State has important interests not present here. *See* Pet. Br. 22 n.16; *infra* at 19.[10]

Petitioners have carefully defined the fundamental liberty interest at stake as freedom from undue State intrusion into the particular choices of sexual expression made by two consenting adults in private. A ruling that Section 21.06 violates that liberty

[10] Another chimera concerns the right to marry. Petitioners here assert a shield to be free from government interference, not any right to affirmative state recognition or benefits. *See infra* at 19.

interest will affect no laws other than those against sodomy and fornication. Those laws have already been repealed or invalidated in the vast majority of the States and are almost never enforced where they remain on the books.

6. Texas has not even tried to argue that there is any justification for Section 21.06 sufficient to withstand the scrutiny applicable to laws burdening fundamental rights. Nor could it. The only "justification" offered is the desire to force every individual and family to conform to the majority's preferred moral image. But state-compelled standardization by majority rule is antithetical to a fundamental right. *See* Pet. Br. 15-16, 28-29. American governments were not constituted to give one faction – "by the superior force of an interested and overbearing majority" – absolute power to dictate every last detail of the private lives of their neighbors. *See The Federalist* No. 10, at 123 (Madison) (Isaac Kramnick ed. 1987). To guard against that very tyranny, "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, 505 U.S. at 847. Where "liberty is infringed," it is "the function of this Court" to redeem that promise. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

III. The Homosexual Conduct Law Draws an Explicit Classification That Denies Equal Protection of the Laws.

Texas has convicted Petitioners under a criminal law that explicitly targets same-sex couples but not different-sex ones for the same behavior. The State cannot evade equal protection review by attempting to recast this law as a "neutral" conduct regulation, because the law expressly treats identical conduct differently depending on who is engaging in it. There is no permissible justification for that classification, even under the most deferential equal protection review. In this specific context, a judgment that the same conduct is immoral when engaged in by one class of persons, but not when engaged in by the majority, necessarily represents a negative judgment about the targeted class, not the conduct. Equal protection bars laws based on bare negative attitudes toward one group. And any other rationale

suggested by Texas or its *amici* also fails, for there is no rational and legitimate basis for this discriminatory criminal law.

1. Texas claims that Section 21.06 is a "facially neutral conduct prohibition[]." Resp. Br. 34. The statute itself belies that contention. Section 21.06 tells only same-sex couples that they are criminally forbidden from engaging in certain forms of sexual intimacy. Those in heterosexual couples – whether married to one another, married to someone else, committed unmarried partners, or newly acquainted – can freely engage in the very same behavior. The statute expressly discriminates on its face because it does not "reach other types of couples performing the identical conduct." *McLaughlin v. Florida*, 379 U.S. 184, 188-91 (1964) (overruling *Pace v. Alabama*, 106 U.S. 583 (1883), which had denied equal protection challenge where statute defined prohibited conduct in terms of the couples engaging in it). Likewise, in *Moreno*, the Court recognized that the conduct of living together was treated differently depending upon who was doing it: "one class is composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the rest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 529 (1973). A different rule for conduct depending on who the participants are plainly triggers review as disparate treatment under "traditional equal protection analysis," *id.* at 533.[11]

Section 21.06's disparate classification of persons – no matter how its explicit discrimination is described – violates equal protection because it lacks any independent, legitimate, and rational State purpose. Pet. Br. 32-40; *infra* at 14-19. This classification, described in longhand, discriminates against those who are attracted to and engage in sexual intimacy with someone

[11] Thus, this is not a facially neutral law with merely a "disparate impact," *cf.* Resp. Br. 35. This classification's obvious discrimination "overtly or covertly" targets same-sex couples and cannot "plausibly" be considered "neutral." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274-75 (1979). In such a case, no separate analysis of discriminatory purpose is required. *Id.*

of the same sex. Contrary to Texas's protests, the classification is also accurately described as discriminating based on sexual orientation and targeting gay people – people with a same-sex sexual orientation. The State's efforts to avoid that description simply ignore the core, ordinary meaning of sexual orientation. Such efforts have been rejected repeatedly by courts considering this exact classification. *See, e.g., State v. Morales*, 826 S.W.2d 201, 204-05 (Tex. App. 1992), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994); *Jegley v. Picado*, 80 S.W.3d 332, 350-54 (Ark. 2002); *Commonwealth v. Wasson*, 842 S.W.2d 487, 502 (Ky. 1992).

That is because the essence of sexual orientation is determined by whether one's sexuality is directed toward those of the same sex, those of the other sex, or both. *See, e.g.*, Pet. Br. 33.[12] By criminalizing the behavior only of those who are sexually attracted to another of the same sex, and exempting those who direct sexual desire toward the other sex, Section 21.06 discriminates on the basis of sexual orientation. Under the challenged classification, gay men and lesbians may not express their sexual orientation through "deviate sexual intercourse," while heterosexuals are allowed to express their sexual orientation through the very same "deviate sexual intercourse." The characteristic of sexual orientation describes and parallels the exact, explicit line drawn here, imposing not "disparate impact" but absolute differential treatment on that basis. The law targets all those not in the dominant, heterosexual group.[13]

Just as there could be no doubt that a law that prohibited

[12] Sexual orientation is a relational characteristic, described by the respective genders of oneself and one's partner, and Section 21.06 uses the gender of one's partner to delineate the favored and disfavored sexual-orientation groups. Texas can take no refuge in the law's use of gender because, of course, gender-based classifications also are not facially neutral for equal protection purposes. *See also* Pet. Br. 32 n.24.

[13] Bisexuals are also targeted, for their sexual orientation includes sexuality directed toward another of the same sex. Like the Court in *Romer*, Petitioners use the group of "gay people" and "lesbians and gay men" to describe succinctly the targets of this classification. *See Romer v. Evans*, 517 U.S. 620, 624 (1996).

"writing with the left hand" targeted those who are left-handed and overtly discriminated on the basis of handedness, there can be no doubt that the Homosexual Conduct Law targets gay people and overtly discriminates on the basis of sexual orientation.[14]

2. In every equal protection case the Court must examine, at a minimum, whether a legal classification "bear[s] a rational relationship to an independent and legitimate legislative end." *Romer v. Evans*, 517 U.S. 620, 633 (1996). This is not determined by the actual thinking of legislators.[15] It is, rather, an assessment whether "plausible" reasoning leads to the conclusion that a legitimate, distinct purpose exists for the line drawn by the statute. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). No plausible reasoning links a permissible government purpose to criminalization of same-sex couples for the same behavior that is freely allowed for different-sex couples.

a. The State now patches together, for the first time, a hypothesis that Texas legislators may have wanted to avoid constitutional litigation over "state authority to regulate marital behavior" when they repealed the prior, evenhanded sodomy law. Resp. Br. 41; *see also id.* at 36-40. That guess at the historical sequence of events does not in any way justify the new law and its classification targeting same-sex couples. The State is positing good intentions in repealing the old law, not any legitimate "legislative end," *Romer*, 517 U.S. at 633, for the new one. Texas's affirmative enactment of the Homosexual Conduct Law in 1973 did not involve some complex "remedial scheme" or "incremental

---

[14] Sexual orientation and handedness are both characteristics tied to behavior, but that does not take away their differentiation between people. Neither does the fact that some people are ambidextrous or bisexual, or that some might on occasion experiment contrary to their nature.

[15] There are tapes of legislative sessions concerning Texas's reform of its entire penal code in 1973, *see* Tex. Legislators Br. 13 & n.5, but those tapes do not illuminate any collective reasoning underlying the particular provision at issue here. *See generally* Randy Von Beitel, *The Criminalization of Private Homosexual Acts*, 6 Human Rights 23, 29-35 & nn. 43, 46-47 (1997); *Baker v. Wade*, 553 F. Supp. 1121, 1150-51 (N.D. Tex. 1982) ("[n]o legislative history is available"), *rev'd*, 769 F.2d 289 (5th Cir. 1985).

reform," Resp. Br. 40, but simply a decision to enact a same-sex-only sodomy offense, and the issue now before the Court is whether that law's classification has a valid purpose. Targeting same-sex couples for criminal penalties bears no rational relation to freeing married couples from regulation; those couples were freed with the repeal of the old law. Moreover, the line drawn by the new classification focuses in no way on marriage, but instead distinguishes between all same-sex and all different-sex couples. *See infra* at 17.

b. Throughout this litigation, Texas has asserted "the promotion of morality" as the basis for Section 21.06. Resp. Br. 42-48. As offered, however, that rationale is not independent of the classification, is illegitimate, and is irrational. Pet. Br. 35-40.

Texas seeks to broaden this case into a referendum about the moral basis for lawmaking. Resp. Br. 42-49. But the case does not call for any absolute and sweeping statements about morality as a justification for laws. Petitioners are not arguing that morality can never be the basis for legislation. So long as fundamental rights and equal protection requirements are left intact, government can enact moral positions into law. Typically, a moral idea coincides with lawmaking that addresses a concrete harm or need of the State. As Texas concedes, *Bowers* "stands alone as the only modern case in which this Court has approved moral tradition as a submitted rational basis for legislation," without any connection to tangible harms or needs. Resp. Br. 27.

Bowers did not consider equal protection and did not decide the narrow issue about morality now before the Court: May the State enact a criminal law solely to express the legislature's or electorate's greater moral disapproval of same-sex couples than of different-sex couples when they do exactly the same thing? Texas says the majority finds it "more 'immoral and unacceptable'" for persons of the same sex to engage in the prohibited acts than for persons of different sexes to engage in the same acts. Resp. Br. 48; Br. in Opp. 18. But a discriminatory moral code – *i.e.*, moral condemnation of one group but not another for the very same conduct – merely expresses disapproval

or negative attitudes toward the *group* condemned. It is being held to a higher moral standard than the majority that is judging it. Such negative attitudes toward a class of persons are an impermissible basis for lawmaking. Negative attitudes toward a class do not become a legitimate ground for adverse treatment simply by appending the term "moral" to them. Pet. Br. 36-40.[16]

The State glaringly rewrites history when it claims that entering into an interracial marriage, or breaking down gender-based employment barriers, or living together in a commune or other household of unrelated persons did not engender moral objections. Resp. Br. 47-48. *See, e.g., Moreno*, 413 U.S. at 535 n.7 ("Government initially argued ... that the challenged classification might be justified as a means to foster 'morality'"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982) (noting false idea that women's equal employment opportunities would cause "moral and social problems"). As in the past, morality is being used in this case to refer to discomfort with and dislike of a particular social group. That is not a form of morality that equal protection of the laws allows. *See Romer*, 517 U.S. at 633-35; *Moreno*, 413 U.S. at 533-38; *see also Wasson*, 842 S.W.2d at 501; *Jegley*, 80 S.W.3d at 353.

c. Though Texas limits its defense of its law to the two arguments addressed above, various *amici* search for other possible rationales. That search is unavailing. The classification drawn in Section 21.06 bears no rational relation to any conceivable and permissible State purpose.

---

[16] The goal of deterring the prohibited conduct, *see* Resp. Br. 41, is not separate from the law's own statement of policy and does not explain its classification. Moreover, Texas never offers any concrete problem or "factors which are properly cognizable" by government, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985), that could explain uniquely punishing same-sex couples. Its only aim here is consistency with the majority's discriminatory morality. Resp. Br. 48 (statute expresses "baseline standard" of "moral beliefs of the people of the State"); *id.* at 48 n.31 (insinuating that same-sex "deviate sexual intercourse" is "detrimental" in some way that different-sex "deviate sexual intercourse" is not, but never identifying detriment).

Many of the *amici* are attempting to defend a law that classifies between married and unmarried couples, but that is not this law. *All* heterosexual couples, whether they are in a one-night stand, an adulterous affair, or a committed relationship outside marriage, were freed by the legislature's actions in 1973, while all same-sex couples became the unique targets of the Homosexual Conduct Law. Section 21.06 was adopted as part of a penal code overhaul that abolished criminal penalties not only for all heterosexual "deviate sexual intercourse," but also for adultery and fornication. Pet. Br. 5. Particularly in the context of the whole code revision that brought it about, this law cannot conceivably be described as promoting or protecting marriage.[17]

Other *amici* contend that the classification here is rationally related to protecting public health, particularly with respect to HIV and AIDS. These arguments seek to tap into the destructive myth that particular persons are responsible for HIV and other diseases to justify a blunt ban that is not a public health tool. As explained in the *amicus* brief of the American Public Health Association *et al.*, the classification in Section 21.06 is wholly unrelated to the prevention of HIV infection. Am. Pub. Health Ass'n (APHA) Br. at 10-27.[18] The lack of any fit is not surprising,

---

[17] Nor does the classification in Section 21.06 serve the purported goal of "funneling sexual activity into the bonds of marriage." Tex. Legislators Br. 23. Section 21.06 and the 1973 changes as a whole actually freed much more non-marital, heterosexual intimacy from criminal regulation and *took away* criminal law pressure on heterosexuals to marry.

[18] APHA *et al.* represent the nation's major associations of public health professionals. *See* APHA Br. 1-3. In stark contrast, the State's *amici* who argue for a connection between the discriminatory standard of the Homosexual Conduct Law and HIV prevention do not offer public health expertise. *See* Pro Family Law Ctr. (PFLC) Br. 1-2 (*amici* are advocacy groups "opposing the legitimization of homosexuality"); Tex. Phys. Resource Council Br. 1 (*amici* approach health issues from Christian perspective and "appl[y] principles of faith and morality to modern medical science and practice"). Instead, they offer offensive and inaccurate generalizations. For example, PFLC quotes an article about HIV transmission from *Rolling Stone* magazine as if it were authoritative, PFLC Br. at 3, even though the sources cited by that article have publicly accused *Rolling Stone* of fabricating the statements attributed to them; notwithstanding the plain inaccuracies,

as the law was enacted well before HIV was even known to exist. The Homosexual Conduct Law bans all oral and anal sex as well as sex with an object for all male-male and female-female couples, but not the same forms of sexual conduct for heterosexual couples. That classification, based solely on the same-sex character of the couple, sweeps vast amounts of very safe sexual intimacy into the prohibition, while leaving much riskier conduct unregulated for a man and a woman. For example, female same-sex couples have exceedingly low rates of HIV and other sexually transmitted diseases – rates that are much lower than those for the heterosexual couples whose sexual conduct is completely unregulated – yet Section 21.06 criminalizes the sexual intimacy of all female same-sex couples. Likewise, it is well known that oral sex (or sex with an object), which is banned for all same-sex couples, is much safer than vaginal or anal intercourse, which are freely permitted for heterosexual couples. In addition, anal intercourse is precisely the same act for any couple that chooses it, yet it is criminalized only for same-sex couples. *See id.* at 10-18. Moreover, the State takes the position that this rarely enforced law does not actually deter any sexual conduct between gay persons. Resp. Br. 48 n.31. It certainly does not even differentiate between safe or protected acts and riskier ones. Far from helping, the Homosexual Conduct Law hampers public health initiatives. APHA Br. 18-27. Like Texas, the Court should reject the *amici*'s "public health" arguments as irrational and unrelated to the challenged classification.

In this realm of sexuality, as in any other, the particular classification drawn by each law must be assessed for rationality and "relevan[cy] to interests the State has the authority to implement." *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (quotation marks omitted). In contrast to other

---

groups like PFLC are deliberately using the article to fuel anti-gay prejudice. *See* Seth Mnookin, *Using 'Bug Chasers,'* Newsweek, Feb. 17, 2003, at 10; Seth Mnookin, *Is Rolling Stone's HIV Story Wildly Exaggerated?*, Newsweek Web Exclusive, Jan. 23, 2003. *See also* Ctr. for Ariz. Policy Br. 1-2 (*amici* with no mental health expertise or scientific credentials make arguments about mental health from perspective of "traditional moral values").

laws invoked by *amici*, this is not a statute in which a legislature has drawn distinctions to ensure that sexual intimacy is consensual, to protect the welfare of children, to regulate and discourage the business of prostitution, to delineate and enforce the legal relationship of marriage, or to keep sexual activity from public places. Distinguishing between couples, for the same common forms of intimacy, based solely on whether they are same-sex or different-sex bears no rational relationship to any conceivable, legitimate interest of the State.

3. The State's *amici* seek to divert attention from the Homosexual Conduct Law's discriminatory intrusion into private intimacies by asserting that Petitioners' equal protection claim is "tantamount to a challenge to the constitutionality of limiting marriage to a heterosexual couple." Am. Ctr. for Law and Justice (ACLJ) Br. 10. To the contrary, Petitioners seek equality under the criminal law, to keep the State out of their bedrooms, not any affirmative access to marriage or other legal structures or benefits. This canard was also offered in *Romer* to distract the Court, *see* Brief of *Amicus Curiae* Concerned Women for America, Inc., 1995 WL 17008430 at *23-24, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), and has no more validity here.

Enforcing the guarantee of equal treatment under the law requires not a "sweeping, novel constitutional decision," ACLJ Br. 1, but a decision comporting fully with past precedent and basic fairness. One should not be convicted of a crime, or face stigma and other penalties flowing from a criminal law, for engaging in forms of intimacy that other adults may freely enjoy.

4. Texas and its *amici* defend the Homosexual Conduct Law as if there were no history of anti-gay discrimination in this country and as if this law did not function as a badge of inferiority, spreading harms well beyond direct criminal prosecutions. *See* Pet. Br. 40-50. But those realities cannot simply be ignored, especially in a case where the State is defending a rarely enforced law as an official expression of condemnation of those Texans who have intimate same-sex relationships. *See* Resp. Br. 48. Indeed, Texas previously stipulated that Section 21.06 "brands

lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law," including "in the context of employment, family issues, and housing." *Morales*, 826 S.W.2d at 202-03; *see also, e.g.*, ABA Br. 12-14; Human Rights Campaign Br. 12-13. Government and private actors deny equal treatment to gay and lesbian citizens in direct reliance on Section 21.06 and other laws like it, because they understand perfectly well that same-sex-only sodomy laws brand gay people with second-class status. As in *Romer* and many earlier cases, the Court should here play its critical role of ensuring that lawmaking does not simply impose inequality on one group of citizens and encourage their further mistreatment and harassment.

5. Finally, the Court should not lose sight of the deeply personal interactions that are targeted by this discrimination. Petitioners' fundamental rights and equal protection claims reinforce each other. The State of Texas has singled out a small and disfavored minority of its citizens and criminalized the expressions of sexual intimacy they share with their chosen partners, but not the same sexual intimacy of others. That is a double affront to the promise of our Constitution. Because it discriminates at the core of the private sphere that is constitutionally protected against state intrusion, the Homosexual Conduct Law is "inconsistent not only with that equality of rights which pertains to citizenship . . . , but with the personal liberty enjoyed by every one within the United States." *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

CONCLUSION

The judgment of the Texas Court of Appeals upholding Section 21.06 and affirming Petitioners' criminal convictions thereunder should be reversed.

Respectfully Submitted,

Paul M. Smith
William M. Hohengarten
Daniel Mach
David C. Belt
Sharon M. McGowan
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, DC 20005
(202) 639-6000

Ruth E. Harlow
Counsel of Record
Patricia M. Logue
Susan L. Sommer
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall Street, Suite 1500
New York, NY 10005
(212) 809-8585

Mitchell Katine
WILLIAMS, BIRNBERG &
ANDERSEN, L.L.P.
6671 Southwest Freeway,
Suite 303
Houston, TX 77074
(713) 981-9595

Counsel for Petitioners

Dated: March 10, 2003